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Insurance

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cause there was a gift to a third person of the portion of the principal not consumed by the first taker. On this point the court failed to cite section 2131.07 of the Ohio Revised Code which reads as follows:

> An estate in fee simple may be made defeasible upon the death of the holder thereof without having conveyed or devised the same, and the limitation over upon such event shall be a valid future interest. For the purpose of involuntary alienation, such a defeasible fee is a fee simple absolute.

Although Charles C. White has stated that this section applies only to realty,[17] a court today might reasonably construe the word "estate" in the statute as including an interest in personalty. In fact in the instant case the court uses the word "estate" as including personalty, with reference to the legacy of $12,500.

In their recent publication on Future Interests, Professors Simes and Smith overlooked section 2131.07 of the Ohio Revised Code, though similar statutes of other states are included.[18]

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INSURANCE

In *Ryland v. State Automobile Mut. Ins. Co.*,[1] the company had issued an automobile liability policy to plaintiff upon payment of the first installment of the total annual premium. This first installment amounted to 40% of the total premium, but the second installment was due two months later. The policy provided for lapse of company liability upon failure to pay an installment, and for resumption of liability as of the date on which a late installment was paid if it was accepted by the company. The plaintiff failed to make the second payment and had an automobile accident for which he was liable. The company refused to defend. The plaintiff sued to recover the amount of the recovery against him and for the costs of defending the suit. His claim was that since he had paid 40% of the annual premium he should be covered for 40% of the yearly period (which would extent beyond the date of the accident) in spite of non-payment of the second installment and the lapse clause in the policy. The plaintiff quoted from a dissenting opinion in *Bek v. Zimmerman*[2] in summarizing the crux of his argument: "It would be contrary to public policy to require a citizen to pay for insurance which

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a discussion of this case and other Kentucky cases on the same issue see SIMES AND SMITH, THE LAW OF FUTURE INTERESTS § 1489 (2d ed. 1956).

[17] White, *Life Estate or Fee?*, 6 CIN. L. REV. 429, 447 (1932).

[18] SIMES AND SMITH, THE LAW OF FUTURE INTERESTS § 1491 (2d ed. 1956).

he does not actually receive."[3] The court, however, held for the defendant because the clear and unambiguous lapse provision was supported by consideration. Furthermore, the rate schedule was stabilized and the desirability of risk determined. Matters of public policy are primarily questions for the Legislature. The court in so holding aligned Ohio with the universal rule on the specific point. Furthermore, it reaffirmed the basic doctrine about which there has been much debate but no retreat — that the relationship between the parties to an insurance policy is governed by principles of general contract law.

In *First Nat'l Bank v. Ohio Cas. Ins. Co.*[4] the defendant insurance company granted to plaintiff bank, as owner of a hotel, extended coverage in a policy of public liability insurance in which the named insured was plaintiff's lessee, the operating company of the hotel. Suit was filed against the bank and the lessee for injuries. The defendant insurance company undertook defense of that suit and answered that the injured person was an employee of the lessee, and having accepted benefits under the workmen's compensation laws could not maintain this suit. The injured person demurred and that pleading was sustained. The defendant then refused to proceed further with the defense and the plaintiff bank undertook its own defense ultimately becoming successful therein. The instant suit was brought by the bank to recover the costs of the earlier defense on the ground that the defendant's withdrawal was a breach of the insurance contract. A court of appeals held for the plaintiff. The liability policy required the insurance company to undertake defense of litigation filed against its insured even though the suit may be successfully defended. The demurrer to the defensive pleading was not an admission of facts which amounted to establishment of a fatal defect in the plaintiff's position in bringing the earlier suit. It was an admission only for the purpose of testing the sufficiency of the facts in law. Consequently, the liability company was not relieved of its defense by the filing of the demurrer. Its withdrawal was a breach of its contract.

An insurance policy in *City Coal & Supply Co. v. American Automobile Ins. Co.*[5] provided comprehensive coverage for damage to certain automotive vehicles except loss caused by "upset." It was held that no "upset" occurred when the rear wheels of a truck, while making a delivery to a house under construction, sank into the excavation for the basement to such an extent that the front wheels were lifted off the ground.

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[1] 100 Ohio App. 557, 137 N.E.2d 437 (1955).

[2] 285 Mich. 224, 280 N.W 741 (1938)

[3] *Id.* at 238, 280 N.W at 747

[4] 137 N.E.2d 770 (Ohio App. 1953)

[5] 99 Ohio App. 368, 133 N.E.2d 415 (1954)

It was further held that when the owner of the truck removes it from the excavation and protects it from further injury, such as the effect of hardening concrete, he is entitled to reimbursement. The policy provided that, whether a basic loss was covered by the policy or not, reasonable expense incurred in preventing further injury would be borne by the insurer.

In *United States Fire Ins. Co. v. Phil-Mar Corp.*[6] a fire which had occurred on leased premises was determined to have been caused by lessee's negligence. The lessor's insurance companies paid the lessor and sued the lessee for the injuries to the reverson on a claim of subrogation to the rights of the lessor. To support this claim it was necessary to establish that the lessor had a right to proceed against the lessee. The court recognized that the lessee is responsible to the lessor for injuries to the reversion in the absence of a valid agreement to the contrary. Consequently, recovery depended upon the terms of the leasing agreement. Two points in the agreement were determinative in the court's mind. First, the lessee was to pay the difference in any increased insurance premium occasioned by the new operation carried on by the lessee. This fact, the court stated, was tantamount "to an understanding between them that the lessor would maintain adequate fire insurance protection on the property leased."[7] Second, the surrender clause of the lease provided that the property would be restored in good condition "loss by fire excepted." As it is common knowledge that fire loss in insurance includes that caused by the negligence of the insured, the court felt that the parties intended that such language in the lease should have a similar meaning. Consequently, fire loss due to lessee's negligence became the responsibility of the lessor. Since the lessor would have no claim against the lessee, neither would the insurance companies which had paid him. Their claim, based on subrogation, could rise no higher than the lessor's.

In *Permanent Ins. Co. v. Cox*[8] the company had paid its insured under a fifty dollar deductible policy for damage to his automobile because of the alleged negligence of defendant. The company then became subrogated to insured's claim to the extent of its payment. Insured brought suit against the alleged tort-feasor who claimed that the company was the real party in interest since it had paid the principal part of the claim. A court of appeals rejected this plea and restated the principle that unless the insured has been paid in full, he is the real party in interest. The insurance company is a proper but not a necessary party.

Revised Code section 3911.10 provides, *inter alia,* that proceeds from

[6] 131 N.E.2d 444 (Ohio App. 1956). This case is also discussed in the LANDLORD AND TENANT section, *infra.*

[7] *Id.* at 446.

[8] 99 Ohio App. 389, 133 N.E.2d 627 (1955).